

# FLORIDA'S DEPENDENCY BENCHBOOK

## BENCHCARD: INEFFECTIVE ASSISTANCE OF COUNSEL

Items in **bold font** are required by Florida Statutes.

### Introductory remarks.

- Explain purpose of the hearing. State the number of days the child has been in care and the number of placements to date.
- Swear in the parties, participants, and relatives. (*See Parties and Participants, Section 8*)

### Representation and appointment of counsel.

- If the court permits an attorney to withdraw, the court must expeditiously appoint **appellate** counsel for indigent parents pursuant to law. Rule 8.517(c)(emphasis supplied).
- Be aware though that an indigent parent is **not** entitled to a court-appointed attorney to assist the parent in preparing, filing, or litigating a motion claiming ineffective assistance of counsel. However, a parent may independently obtain an attorney to represent the parent in pursuing the motion. Rules 8.517(c) & 8.530(d)(1).
- An indigent parent is otherwise entitled to a court-appointed attorney as provided by law in both the trial and appellate court in a termination of parental rights proceeding, and is entitled to a court-appointed attorney concerning appellate review of the trial court's order on the motion for ineffective assistance of counsel. Rule 8.530(d)(2).

### Parties and notices.

- **Have all parties identify themselves for the record with full name and permanent address. § 39.0131. See also §§ 39.402(8)(g) & 39.506(4).** Advise parties that the court will use the address for notice purposes until notified otherwise in writing. (Note: Do not openly identify the address when one or more of the parents is party to an injunction for protection against domestic violence.)
- Confirm that the parent claiming ineffective assistance of counsel served the motion on all parties to the termination of parental rights proceedings and on the attorney the parent claims provided ineffective assistance. Rule 8.530(k).
- Confirm that the court issued a notice of hearing on the motion to the parties and participants of the termination of parental rights proceeding and to the attorney who the parent claimed provided ineffective assistance. Rule 8.530(n)(2).
- The notice must state the issues to be determined and that the moving parent is required to present evidence at the hearing on the motion. Rule 8.530(n)(2).

### Timeliness and legal sufficiency of motion.

- Confirm that the motion was timely filed. A motion claiming ineffective assistance of counsel must be filed within 20 days of the date the court entered the written order terminating parental rights. Rule 8.530(e).

- The court must enter an order within 5 days from the date the motion or amended motion was filed summarily denying with prejudice any motion filed after the 20 day limitation for filing. The order shall be considered the final order for purposes of appeal. Rule 8.530(l)(1).
- Determine whether the motion was amended. If the motion is timely filed, the parent may file amended motions without permission of the court within 20 days from the date the court entered the written order terminating parental rights. The court may order the moving parent to file an amended motion as provided in Rule 8.530. Rule 8.530(h).
- If the motion or amended motion is legally insufficient as alleged, the court may either:
  - Enter an order summarily denying the motion within 5 days from the date the motion or amended was filed; Rule 8.530(l)(2); **OR**
  - Enter an order within 5 days from the date the motion, or amended motion, was filed authorizing the moving parent to file an amended motion within 10 days of the date the written order permitting amendment. Rule 8.530(m).
- A motion is legally insufficient when the allegations of ineffective assistance of counsel during the termination of parental rights proceedings, if taken as true, did not prejudice the parent's case to such an extent that but for counsel's deficient performance the parent's rights would not have been terminated. Rule 8.530(l)(2).
- The order denying a motion as legally insufficient must set forth the basis for the conclusion the motion is legally insufficient. The court must not summarily deny a motion as insufficient for reasons other than legally insufficient allegations claiming ineffective assistance of counsel. Rule 8.530(l)(2).
- If the court denies the motion as legally insufficient and does not direct the filing of an amended motion, then the order shall be considered the final order for purposes of appeal. Rule 8.530(l)(2).

Evidentiary hearing on the motion claiming ineffective assistance of counsel.

- If the motion is timely and contains sufficient allegations, conduct an evidentiary hearing as expeditiously as possible in light of the other time limitations in Rule 8.530. Rule 8.530(n)(1).
- If necessary, the court may order an expedited record for review, which may include an electronic recording in lieu of a transcript, of the TPR adjudicatory hearing. Rule 8.530(n)(3).
- If the judge conducting the motion hearing is different from the judge who presided at the TPR adjudicatory hearing, the court must order an expedited record for review, which may include an electronic recording in lieu of a transcript, of the TPR adjudicatory hearing. Rule 8.530(n)(3).
- Proceed through the regular course of the evidentiary hearing.

- The moving parent has the burden of presenting evidence and the burden of proving specific acts or omissions of an attorney's representation of the parent during the TPR proceedings that constituted a failure to provide reasonable, professional assistance, and how the errors or omissions prejudiced the parent's case to such an extent that but for counsel's deficient performance the parent's rights would not have been terminated. Rule 8.530(n)(4).
- All other parties may present evidence regarding the claims raised. Rule 8.530(n)(4).

Complete a written order.

- At the conclusion of the hearing, the court must enter an order granting or denying the motion within 5 days from the evidentiary hearing. Rule 8.530(n)(5).

## INEFFECTIVE ASSISTANCE OF COUNSEL MOTION HEARING SUPPLEMENT

- **Burden of evidence and standard of proof.**

The moving parent has the burden of presenting evidence and the burden of proving specific acts or omissions of an attorney's representation of the parent during the TPR proceedings that constituted a failure to provide reasonable, professional assistance, and how the errors or omissions prejudiced the parent's case to such an extent that but for counsel's deficient performance the parent's rights would not have been terminated. Rule 8.530(n)(4).

- **Granting the motion.**

If the court determines that the attorney during the TPR proceedings failed to provide reasonable, professional assistance and that the errors or omissions prejudiced the parent's case to such an extent that but for counsel's deficient performance the parent's right would not have been terminated, the court must enter an order granting the motion stating the reasons for granting the motion and vacating the order terminating parental rights without prejudice. Rule 8.530(n)(5)(A).

If the court grants the motion, appoint an attorney to represent the parent in further proceedings as provided by law. Rule 8.530(n)(5)(A).

- **Denying the motion.**

If the court determines that the attorney during the TPR proceedings provided reasonable, professional assistance or determines that no errors or omissions prejudiced the parent's case in the termination proceedings to such an extent that but for counsel's deficient performance the parent's rights would not have been terminated, the court must enter an order denying the motion, stating the reasons for denial. Rule 8.530(n)(5)(B).

The order denying the motion resolves all the claims raised in the motion and shall be considered the final order for purposes of appeal. Rule 8.530(n)(5)(B).

➤ **Requirements of written order.**

State the facts upon which the decision was made.

If the motion is granted, schedule an adjudicatory hearing on the TPR petition to take place no later than 45 days from the order granting the motion. Rule 8.530(n)(5)(A).

If the motion is granted, appoint an attorney to represent the parent in further proceedings, as provided by law. Rule 8.530(n)(5)(A).

If the motion is granted, state the reasons for granting the motion and vacating the order terminating parental rights without prejudice. Rule 8.530(n)(5)(A).

If the motion is denied, state the reasons for denial in the order. Rule 8.530(n)(5)(B).

Ensure that the order clearly sets forth the witnesses that testified.

What must I include in the order? The order denying a motion as legally insufficient must set forth the basis for the conclusion the motion is legally insufficient. The court must not summarily deny a motion as insufficient for reasons other than legally insufficient allegations claiming ineffective assistance of counsel. Rule 8.530(l)(2).

If the court denies the motion as legally insufficient and does not direct the filing of an amended motion, then the order shall be considered the final order for purposes of appeal. Rule 8.530(l)(2).

If the court granted the motion, the order must state the reasons for granting the motion and vacating the order terminating parental rights without prejudice. Rule 8.530(n)(5)(A).

If the court denied the motion, the order must state the reasons for denial. Rule 8.530(n)(5)(B).

Are there specific requirements for a motion claiming ineffective assistance of counsel?

Yes. The motion alleging ineffective assistance of counsel must:

- be in writing and under oath stating that all of the facts stated are true and correct;
- contain the case name and number and identify the date the written order terminating parental rights was entered;
- contain the current mailing address and e-mail address, if any, and the phone number(s) of the parent filing the motion for the purpose of receiving notices and orders; **and**
- identify specific acts or omissions in the attorney's representation of the parent during the termination of parental rights proceedings that constituted a failure to provide reasonable, professional assistance and explain how the acts or omissions prejudiced the parent's case to such an extent that but for counsel's deficient performance the parent's rights would not have been terminated. Rule 8.530(g)(1)-(4).

What is standard for the IAC hearing? The moving parent has the burden of presenting evidence and the burden of proving specific acts or omissions of an attorney's representation of the parent during the TPR proceedings that constituted a failure to provide reasonable, professional assistance, and how the errors or omissions prejudiced the parent's case to such an extent that but for counsel's deficient performance the parent's rights would not have been terminated. Rule 8.530(n)(4).

Isn't that standard different than the criminal IAC standard set forth in Strickland v. Washington? Yes. The standard is different. The Florida Supreme Court has explicitly rejected the Strickland standard. J.B. v. Department of Children and Families, 170 So. 3d 780, 792 (Fla. 2015)(creating interim procedure for bringing claims of ineffective assistance of counsel in termination of parental rights cases).

How quickly should I rule on the IAC motion? At the conclusion of the hearing, the court must enter an order granting or denying the motion within 5 days from the evidentiary hearing. Rule 8.530(n)(5).

What happens if I fail to enter an order? If the court does not enter an order granting or denying the motion within 50 days from the date the court entered the written order terminating parental rights, the motion shall be deemed denied with prejudice. Rule 8.530(o).

Does anyone need to be served with the order? Yes. The clerk of the court must serve any order entered on the parties, including to the moving parent at the parent's address on file with the clerk, within 48 hours from the rendition of the order indicating the date of service by an appropriate certificate of service. Rule 8.530(p).

Is the parent permitted to file an additional motion after the initial/amended motion? No second or successive motion claiming ineffective assistance of counsel shall be allowed except as provided in Rule 8.530. Rule 8.530(q).

Can the parent request a rehearing on the motion? No motion for rehearing shall be allowed in response to the court's ruling on the motion claiming ineffective assistance of counsel. Rule 8.530(q).

Cite the specific provision of § 39.0136 when granting continuances.